

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**JOHN C. REICH**

Claimant

VS.

**DILLON COMPANIES**

Self-Insured Respondent

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Docket No. 1,054,413

**ORDER**

**STATEMENT OF THE CASE**

Respondent requested review of the April 12, 2011, preliminary hearing Order entered by Administrative Law Judge John D. Clark. Lawrence M. Gurney, of Wichita, Kansas, appeared for claimant. Matthew J. Schaefer, of Wichita, Kansas, appeared for the self-insured respondent.

The Administrative Law Judge (ALJ) found that claimant's current problems with his right foot are directly related to his work injury of November 26, 2010, and respondent was ordered to pay all medical as authorized. Further, the ALJ ordered temporary total disability benefits be paid beginning November 29, 2010,<sup>1</sup> until claimant is released.

The record on appeal is the same as that considered by the ALJ and consists of the deposition of John Clyde Reich taken March 7, 2011, and the transcript of the April 12, 2011, Preliminary Hearing and the exhibit, together with the pleadings contained in the administrative file.

**ISSUES**

Respondent requests review of whether claimant's need for medical treatment and temporary total disability benefits was a direct and natural consequence of his work-related injury to his right great toe. Respondent argues that claimant suffered an intervening injury, a burn injury to his right foot, and claimant's need for medical treatment and

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<sup>1</sup> The ALJ's Order of April 12, 2011, indicates that temporary total payment should begin November 29, 2011, but it appears this was a typographical error and the correct date should be November 29, 2010.

temporary total benefits are a result of that intervening injury, which terminates respondent's responsibility to provide temporary total disability benefits.

Claimant contends the ALJ's Order should be affirmed. He argues that his act of soaking his foot in hot water and the events that followed were the direct and natural result of the primary injury, not an intervening injury.

The issue for the Board's review is: Is claimant's need for workers compensation benefits a direct and natural result of his primary work-related injury?

#### **FINDINGS OF FACT**

Claimant worked for respondent as a meat cutter. On November 26, 2010, while claimant was in the cooler, a wooden pallet came down on his right foot. He reported the accident to the meat assistant. Although claimant had some pain in his foot, he continued to work and finished his shift that day. When claimant reported to work the next day, his foot was quite sore, and he spoke to the meat manager about it. Either that evening or the next day, his right foot and right big toe had swollen to a point where he was unable to put on his shoes. In an attempt to reduce the swelling in his foot, claimant ran some hot water from the tap into a container. He put his hand in the water, and the water felt warm but not hot. However, when he put his foot into the container, the foot started to blister and turn red from the ankle down. Claimant said his foot was only in the water about five seconds. He suffered second and third degree burns to his right foot. Claimant has diabetes and has had sensation problems with his feet even before this incident.

Claimant went to see his doctor on or about November 28, and he was told that his right big toe was broken and he would need to stay off his foot for some time. His doctor also told him he would need to remain off his foot because of the burns on the foot. Claimant agreed that the primary treatment he has received to this point has been because of the burns on his foot. As a result of the burns, claimant developed an infection, and because of the infection, he had a toe surgically amputated. Claimant indicated that he is not currently being treated for his broken right toe, and the only medical treatment he is receiving at the present time is related to the burns he sustained while soaking his foot. His wound doctor, Dr. McDonald, has told him he could be unable to wear a shoe for another three months.<sup>2</sup> He undergoes daily dressing changes to the burns on his foot. He has not been able to work since he burned his foot.

#### **PRINCIPLES OF LAW**

K.S.A. 2010 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's

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<sup>2</sup> Dr. McDonald told him this about a week before the preliminary hearing.

right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2010 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.<sup>3</sup> Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.<sup>4</sup>

In *Logsdon*,<sup>5</sup> the Kansas Court of Appeals stated:

Whether an injury is a natural and probable result of previous injuries is generally a fact question.

When a primary injury under the Worker's Compensation Act is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.

In *Roberts*,<sup>6</sup> the Kansas Supreme Court said:

Where an injury is compensable under the Workers Compensation Act (K.S.A. 44-501 *et seq.*), any aggravation of that injury or additional injury arising from medical malpractice in the treatment thereof is a consequence of the primary injury and compensable under the Act.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>7</sup> Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted

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<sup>3</sup> K.S.A. 2010 Supp. 44-501(a).

<sup>4</sup> *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

<sup>5</sup> *Logsdon v. Boeing Company*, 35 Kan. App. 2d 79, Syl. ¶¶ 1, 2, 128 P.3d 430 (2006); see also *Leitzke v. Tru-Circle Aerospace*, No. 98,463, unpublished Court of Appeals opinion filed June 6, 2008.

<sup>6</sup> *Roberts v. Krupka*, 246 Kan. 433, 442, 790 P.2d 422 (1990); see also *Mercier v. Bradley Real Estate*, No. 103,198, Kansas Court of Appeals unpublished opinion filed May 13, 2011.

<sup>7</sup> K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. \_\_\_, (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.<sup>8</sup>

### ANALYSIS

Respondent does not dispute that claimant injured his right foot, specifically his right great toe, as the result of a pallet falling on the foot at work on November 26, 2010. As such, respondent acknowledges claimant suffered personal injury by accident arising out of and in the course of his employment. Nevertheless, respondent contends it is not liable for claimant's medical treatment and temporary total disability compensation because the need for those benefits result from claimant's decision to soak his injured foot in hot water and the burns he suffered therefrom. Accordingly, his treatment and disability result from a subsequent intervening injury, which respondent contends relieves it of liability. This Board Member disagrees.

The *Roberts* and *Mercier* cases stand for the proposition that injuries that occur as a result of medical treatment, even negligent treatment, for a work-related injury are compensable. While claimant's decision to self-treat his foot by soaking it in hot water was not done upon the advice of a physician, it is analogous to that scenario. The fact that claimant was negligent in allowing the water to be too hot does not change the result. In both *Roberts* and *Mercier*, the physicians were negligent and the claimant's injuries resulted from that negligence. Nonetheless, the Kansas appellate courts determined that those resulting injuries were compensable under the Workers Compensation Act.

The ALJ found claimant was temporarily and totally disabled. The Board is without jurisdiction on an appeal from a preliminary hearing order to review that determination. The Board may review, however, whether that disability is due to the work injury. This Board Member finds that it is.

### CONCLUSION

For the reasons stated above, claimant's current foot condition and need for treatment, together with his temporary inability to return to work, are the direct consequence of his work-related accident.

### ORDER

**WHEREFORE**, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge John D. Clark dated April 12, 2011, is affirmed.

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<sup>8</sup> K.S.A. 2010 Supp. 44-555c(k).

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of June, 2011.

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HONORABLE DUNCAN A. WHITTIER  
BOARD MEMBER

c:     Lawrence M. Gurney, Attorney for Claimant  
       Matthew J. Schaefer, Attorney for Self-Insured Respondent  
       John D. Clark, Administrative Law Judge